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CONCEPTS OF PUNISHMENT AND DAMAGES FOR TORT

sions, leaving the other three or four to deal with reports and discussions of cases, etc., with such editorial remarks as they might call for? Such an arrangement would give contributors a chance, not merely to make remarks about legal questions, but to take them up for a thorough discussion. In this way a beginning might be made towards the creation of a scientific jurisprudence, the lack of which is much felt, and which some people have thought could be supplied, if somebody would give a million or so for the purpose of creating an American corpus juris."

R. H. G.

The Concepts of Punishment and of Damages for Tort.—Prof. Giulio J. Battaglini, a translation of whose article on the "Function of Private Defense in the Repression of Crime" appeared in the last issue of this JOURNAL, in a pamphlet reprinted from the *Rivista Penale*, discourses upon the concepts of punishment and of damages for tort. Punishment and damages for tort, he says, are both consequences of anti-juridicity. But punishment is the sanction of criminal law while damages for tort are the sanction of private right. There is no substantial criterion of distinction between crime and tort. The only sure and irrefragable criterion is formal. Crimes are torts prosecutable in a peculiar way, namely, by way of punishment. We cannot say that the imposition of punishment indicates that the public interest is involved and that the imposition of the obligation to pay damages indicates that private interest is involved, because every judicial guard shields both public and private interest. When we speak of public interest we mean an interest immediately public, and when we speak of private interest we mean an interest immediately private. But we cannot draw a line of demarkation even between these. It is the fiat of the legislator that distinguishes between them and that declares one act or omission affected with an immediately public interest and another act or omission affected with an immediately private interest.

Merkel and Heinze say that damages for tort are but a species of punishment. But, it seems to the author, damages for tort are intended to heal an old wound, while punishment produces a new wound. That damages for tort are not punishment is shown by this fact, among others, that the granting by the state of the right to sue for damages does not exempt from penal discipline. Venezian says that punishment is an absolute evil inasmuch as it means privation for one without corresponding advantage to another, while damages for tort are a relative evil inasmuch as damages are a loss to him who must pay them but a profit to him who receives them. But this is a mistake. Does not the state benefit from the fear raised in the breasts of the generality of individuals and from the prevention of the commission of more crimes during the imprisonment of the criminal?

There is a further difference between the concepts under analysis. The undergoing of punishment requires only a passive behavior, the obligation to pay damages implies active conduct. The essence of punishment is the restriction of the liberty of individuals. And in the case of fines we have a near approach, at least in semblance, to damages for tort. Punishment for crime can never be the consequences of anything but an act against law; but damages may be imposed for conduct allowed by law. For example, Art. 713 of the Italian Civil Code and Sec. 962 of the German Civil Code authorize the owner of bees to follow them into the property of others, but they enjoin that he re-

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pair the wrong. Again children and insane persons are not responsible criminally, but in certain cases their property may be drawn upon to pay damages for a wrong committed. Only responsible persons therefore are subjected to physical compulsion, but the representatives of children and insane persons are bound to heal the old wound made by the latter. An interesting question now arises: Should the state repair the damage caused by children and insane persons who are both irresponsible in the eyes of the law? There is no justification in law for charging their estates because their acts or omissions are not anti-juridical. "But I should base my position," says the author, "in favor of charging the estates of individuals upon the ground of social utility. Social utility is the touchstone by which you must test every juridical situation." To resume the antithesis; it must also be noted that it makes no difference who pays the damages just so long as they are paid, whereas punishment can be inflicted only upon the responsible doer of the wrong. Finally, it is important to mark that while the command of the state to pay damages may be directed to associations of individuals, it is the individual alone who can commit crime and who must undergo punishment.

[Furnished by Robert Ferrari, New York City.]

Justice De Courcy's Promotion.—In the *Boston Transcript* is an account of the promotion of Justice De Courcy to a Justiceship in the Supreme Court of the state of Massachusetts. The writer of the editorial in the *Transcript* says that Justice De Courcy has had the distinct advantage of having been a very successful lawyer. Besides this, and in addition to having been a strong judge in the Superior Court, Mr. De Courcy has a strong literary bent. He is exceedingly well grounded in the classics and in poetry and is noted for his oratorical ability, which he has shown in occasional addresses. Moreover, as the readers of this JOURNAL know, his interest in criminal law has always been strong and extensive. Ever since the organization of the American Institute of Criminal Law and Criminology, he has been an active contributor to the JOURNAL of the Institute and a member of its editorial board.

In 1882 and 1883 Judge De Courcy was in the law office of the late Hon. John K. Tarbox, and in January of 1884 he became assistant district attorney with the Hon. H. F. Hurlburt, which office he held six years. In 1887 he was honored by appointment to the presidency of Boston University Law School Alumni Association. He was chosen city solicitor of Lawrence in 1892. The year following he entered partnership with Attorney Walter Coulson. The same year he was chosen trustee of the public library. In 1907, Judge De Courcy was chosen president of the State Conference of Charities, and in 1908 was appointed the first chairman of the Massachusetts Probation Commission, the law creating which he was instrumental in having enacted. He is vice-president of the National Conference of Catholic Charities; chairman of the committee of criminal law reform of the American Prison Association. He is a member also of the Board of Visitors of Boston University Law School. Last year he was chosen one of the Massachusetts delegates to the International Prison Congress at Washington.

R. H. G.

Criminals and the Law.—The following is from the Canadian *Law Times* for July, 1911, under the authorship of Archibald Hopkins, Esq.:

"There is a change in the present method of administering the criminal law